MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. 35 CENTS PER NUMBER

NOTE AND COMMENT.

THE COMPLETION OF A CONTRACT BY POSTING OF ACCEPTANCE.—In the recent case of *Kennedy Mercantile Co.* v. *Western Union Telegraph Co.*, 167 S. W. 1094 (Texas, 1914), the court says, "It is well settled law in this state that, where an offer is submitted by letter, an acceptance is conclusive and binding when a letter is deposited in the post-office accepting the same. The delivery to the one making the offer is not the test; for when the offer is submitted in that way it is equivalent to an invitation to accept by the same means, and when the acceptance is delivered to the agency chosen by the one making the offer the contract is complete."

This expresses the generally accepted rule of contract law, but like nearly all other declarations of the rule, the context is absolutely silent as to the reasons why that particular point in events is the one at which completion occurs.

There are two theories possible, the one that the contract is then complete because, the post being the offeror's agent, *communication* of the acceptance to the offeror is then first accomplished; the other that acceptance is then first irrevocably manifested, and notice of such acceptance put into reasonable course of communication to the offeror. Neither of these theories has, it would appear, been generally accepted positively.

If it be held that, in order to complete a contract, *communication* of assent to the offeror is necessary, then only the first theory is at all tenable. This view is suggested by POLLOCK in his work on CONTRACTS, (WILLISTON'S edition) p. 35, wherein he says, "Where the acceptance is to consist of a promise it must be communicated to the proposer. But where the acceptance is to consist of an act * * * it seems that no further communication of the acceptance is necessary than the performance of the proposed act. * * * Further, even when the acceptance consists of a promise, and therefore must be communicated, any reasonable means of communication prescribed or contemplated by the proposer are deemed sufficient."

So also, in LAWSON, CONTRACTS, p. 37, is the statement, "From the foregoing sections we draw these conclusions: That the acceptance of an offer must be communicated to the offerer; that it is communicated to him when it is delivered to his agent or messenger; that the post-office and telegraph are his agents respectively when he expressly makes them so by requesting a reply by mail or telegraph * * * (citing illustrations such as mailing acceptance). Here the acceptance is 'communicated' to A and the contract is complete, though A never receives any of the acceptances."

This is apparently the idea under which the court acted in the case of *Household Fire Ins. Co.* v. *Grant*, 4 Exch. Div. 216, which finally settled the English law in declaring acceptance to be complete upon posting thereof. The court therein says, "Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless, therefore, a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment. * * * But on the other hand, it is a principle of law, as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance which only remains in the breast of the acceptor, without being actually and by legal implication communicated to the offerer, is no binding acceptance. How then are these elements of law to be harmonized in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the post-office as the agent of both parties, * * * 'If the doctrine that the post-office is only the agent for the delivery of the notice were correct, no one could safely avail himself of that mode of transmission.' But if the post-office be such common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the post-office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive that acceptance." In the dissenting opinion it is said, "Where a proposition to enter into a contract is made and accepted, it is necessary, as a rule, to constitute the contract, that there should

be a communication of that acceptance to the proposer," and vigorous objection is made to the majority holding because there was no communication, as "posting a letter does not differ from other attempts at communication in any of its consequences, save that it is irrevocable as between the poster and the post-office."

Is it true, however, that the acceptance must have been *communicated* before the contract can be complete? Certainly it is not the fact in cases where acceptance is signified by the performance of an act which constitutes the consideration. This is too well settled to need citation of authority. Whenever any reason at all is given for such a holding it is, practically, invariably that the doing of the act has *clearly manifested the intent to accept.*

If this be the fact in the case of performance of some act of consideration there would seem to be no valid reason whatsoever why it should not be equally the true basis for holding that an acceptance involving a counter promise completes the contract upon its being posted. There is certainly much authority for ascribing this "irrevocable manifestation of intent" as the true reason.

The earlier cases holding the contract to be complete upon posting of acceptance place their holding upon practical grounds merely. In *Dunlop* v. *Higgins,* 1 H. of L. Cas. 381, the court after citing with approval *Adams* v. *Lindsell,* 1 B. & A. 681, to the effect that if the contract were not so complete, before the acceptance were actually received, it never could be completed, said, "Common sense tells us that transactions can not go on without such a rule * * *."

Later authority is however more precise. In *Mactier* v. *Frith,* 6 Wend. (N. Y.) 103, the court said, "Anything that shall amount to a manifestation of a formal determination to accept, communicated or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract; but a letter written would not be an acceptance, so long as it remained in the possession or under the control of the writer. An acceptance is the distinct act of one party to the contract, as much as the offer is of the other; the knowledge by the party making the offer, of the determination of the party receiving it, is not an ingredient of the acceptance. It is not compounded of an assent by one party to the terms offered, and a knowledge of that assent by the other." To precisely similar purport is the language in *Hallock* v. *Insurance Co.,* 26 N. J. Law 268, 280. So also it was said, in *Tayloe* v. *Merchants' Fire Ins. Co.,* 9 How. 390, 400, "The negotiation being carried on through the mail, the offer and acceptance can not occur at the same moment of time; * * * and as it must take effect, if effect is to be given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion till notice of such acceptance has been received and assented to by the company."

In *Trevor* v. *Wood,* 36 N. Y. (9 Tiffany) 307, it is said, "The sending

of a letter accepting the proposition is regarded as an acceptance, because it is an overt act clearly manifesting the intention of the party sending it to close with the offer of him to whom it is sent, and thus marking that *aggregatio mentium,* which is necessary to constitute a contract." See also *White* v. *Corlies,* 26 N. Y. 467.

The reason for holding the contract not complete until the letter is actually posted is obvious; it is not irrevocable and, hence, not "clearly manifest" until then.

The necessity that the acceptance be returned, in some manner expressly or impliedly authorized by the offerer, grows out of the rule that though the acceptance may be complete upon clear manifestation, it must nevertheless be eventually communicated to the offerer or at least put into the proper channel of communication. It is well settled that the post-office and the telegraph are such proper means of communication that when their use has been authorized by the offerer, the offeree is freed from responsibility, and he has done all that is requisite in attempting to give notice when he has entrusted his message in proper form to them. As was said in *Dunlop* v. *Higgins,* supra, "If he puts a letter into the post at the right time, it has been held quite sufficient; he has done all that he is expected to do so far as he is concerned; he has put the letter into the post and whether that letter be delivered or not, is a matter quite immaterial, because for accidents happening at the post-office he is not responsible."

The underlying idea of the necessity for putting notice of acceptance in proper course of communication appears to be that while the contract is completed by acceptance, clearly manifested, the offerer will not be liable in damages for breach if he has not had reasonable notification thereof. In *Bishop* v. *Eaton,* 161 Mass. 496, there "was an offer to be bound in consideration of an act to be done, and in such case the doing of the act constitutes the acceptance of the offer and furnishes the consideration. Ordinarily there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. * * * But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee can not be affected by a subsequent withdrawal of it, if within a reasonable time afterward he notifies the promisor. * * * What kind of a notice is required depends upon the nature of the transaction, the situation of the parties, and the inferences fairly to be drawn from their previous dealings, if any, in regard to the matter. If they are so situated that communication by letter is naturally to be expected, then the deposit of a letter in the mail is all that is necessary."

By this theory the cases are harmonized much more exactly than by the theory that acceptance is communicated when posted or given to a telegraph company. In the instance, for example, of mutual offers having crossed, if one person were in the same letter of reply to accept the offer made to him and revoke his own offer, the acceptance would be held effective as of the date of posting but the revocation of no effect till received by the ad-

dressee. To explain this on the ground of actual "communication" of the acceptance makes the whole result a somewhat ridiculous legal fiction. But to explain it on the ground that enough has been done to constitute acceptance, regardless of the present knowledge of the offerer, is reasonably consistent.

To hold that mailing an offer makes the telegraph such an agent of the offerer that entrusting an acceptance to the latter amounts to "communication" to the offerer is a wide stretch of judicial fiction. It is equally so to hold that if, as in *Henthorn* v. *Fraser,* 2 Chancery 27, the offerer has delivered the offer by hand, he has so constituted the post his agent for a reply that posting the reply will amount to communication.

It is true, to be sure, that the acceptance must be sent to the offerer by some method expressly or impliedly authorized by him. This, however, is not because such sending constitutes communication necessary to completion of the contract, but because otherwise the responsibility is upon the offeree to see to it that the notification of completion of the contract duly reaches the offeror. Communication of completion is quite different from completion by communication, although the former may be necessary to the creation of an actual liability.

So, all considering, it would seem thoroughly correct to say that when a contract is completed upon the posting of an acceptance, it is because the posting amounts to a clear manifestation of acceptance put in the proper course of communication to the offerer. J. B. W.

REGULATING THE RATES ON PARTICULAR CLASSES OF SERVICES.—A North Dakota statute imposed a maximum rate upon the carriage of coal. The rate affected mainly the transportation of lignite. This particular traffic constituted only a small part of the total freight traffic of the roads involved in the suits. The rate had been declared non-confiscatory by the state court in a previous suit, (see *State* v. *N. P. Ry. Co.,* 19 N. D. 45), which decision was sustained by the United States Supreme Court in *N. P. Ry. Co.* v. *North Dakota,* 216 U. S. 579. After these decisions the rates were continued in force for several years. During this period of trial it was found that the prescribed rates were inadequate to enable the carrier to earn a substantial compensation on the traffic affected. It was even shown that a deficit was incurred on this branch of the service after it had been charged with its due portion of the common expenses of the road. The returns were, however, sufficient to pay the "out of pocket" costs of this traffic. It was *held,* that the rates in question were confiscatory; *N. P. Ry. Co.* v. *North Dakota; Minn., St. P. & S. S. M. Ry. Co.* v. *North Dakota,* 236 U. S. 585, 35 Sup. Ct. 429. A West Virginia statute prescribed maximum rates for passenger service which after due trial were found inadequate to allow the carrier substantial compensation upon this department of the service. *Held,* that in regulating the rates of this branch of the service, the rates must permit a fair return on this service taken by itself; that the rates prescribed were confiscatory in respect to the particular carrier involved in the case; *Nor. & W. Ry. Co.* v. *Att. Gen. of W. Va.,* 236 U. S. 605, 35 Sup. Ct. 437.